(2)

FILED
JAN 29 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-747

In the Supreme Court of the United States

JOHN GILLARD,

Petitioner,

v.

BETTY MITCHELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARC DANN
Attorney General of Ohio

ELISE PORTER*
Acting Solicitor General
**Counsel of Record*
HEATHER L. GOSSELIN
CHARLES L. WILLE
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Respondent
Betty Mitchell

CAPITAL CASE

QUESTIONS PRESENTED

I. Whether the *Sullivan* presumption applies to a case where one attorney represents the defendant and a witness implicated in the same shootings, and the trial court appoints separate counsel for the witness prior to the witness testifying near the conclusion of the trial?

II. Whether a trial court has a duty to inquire of the defendant on trial when the prosecution raises a conflict of interest?

III. Whether cumulative error is a cognitive claim in federal habeas corpus review?

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF FACTS 2

A. John Gillard shot Leroy Ensign, Ronald Postlethwaite and Denise Maxwell after a New Year's Eve party on the early morning hours of January 1, 1985 and then fled the state. 2

B. John Gillard and William Gillard are arrested and John Gillard is bound over to the grand jury. 3

C. William Gillard testified as an alibi witness at John Gillard's trial. 4

D. Evidentiary hearing on alleged conflict of interest. 4

E. The state court's treatment of Gillard's conflict of interest claim. 7

F. The federal courts' treatment of the alleged conflict of interest claim. 8

REASONS FOR DENYING THE WRIT 9

A. Gillard's case does not present the appropriate circumstances to address the scope of the conflict of interest rule announced in *Cuyler v. Sullivan* or the automatic reversal rule announced in *Holloway v. Arkansas*. 9

1. Because the Supreme Court of Ohio applied *Sullivan* in this case and found no actual conflict, there is no need for the Court in this case to address the scope of *Sullivan*'s application to situations of successive representation. 11

2. Under the facts and circumstances of this case, there is no likelihood that counsel's "successive representation" evidences circumstances that would require application of *Sullivan's* presumption of prejudice and *Holloway's* automatic reversal rule. 14

B. This court should not take this case to establish a "catch all" cumulative error claim for habeas corpus petitioners such as Gillard 19

CONCLUSION 23

TABLE OF AUTHORITIES

Cases **Page(s)**

Alvarez v. Boyd,
225 F.3d 820 22

Cuyler v. Sullivan,
446 U.S. 335 (1980) ..... *passim*

Darden v. Wainwright,
477 U.S. 1768 (1986) 1, 21

Darks v. Mullin,
327 F.3d 1001 (10th Cir. 2003) 22

Donnelly v. DeChristoforo,
416 U.S. 637 (1974) 1, 21, 22

Enoch v. Gramley,
70 F.3d 1490 (7th Cir. 1995) 16

Gillard v. Mitchell,
445 F.3d 883 (6th Cir. 2006) 13, 21, 23

Hamilton v. Mullin,
436 F.3d 1181 (10th Cir. 2006) 22

Holloway v. Arkansas,
435 U.S. 475 (1978) 1, 9, 10, 19

Jackson v. Johnson,
194 F.3d 641 22

Lorraine v. Coyle,
291 F.3d 416 (6th Cir. 2002) 20

Mickens v. Taylor,
535 U.S. 162 (2002) 9, 13, 16

Perillo v. Johnson,
205 F.3d 775 (5th Cir. 2000) 14, 15, 16

Scott v. Elo,
302 F.3d 598 (6th Cir. 2002) 21, 23

State v. Gillard,
64 Ohio St. 3d 304 (1992) 11

Strickland v. Washington,
466 U.S. 668 (1984) 10

Thomas v. Hubbard,
273 F.3d 1164 (9th Cir. 2001) 22

United States v. Hastings,
461 U.S. 499 (1983) 1, 21

United States v. Infante,
404 F.3d 376 (5th Cir. 2005) 16

United States v. Sonia Gallegos,
108 F.3d 1272 (10th Cir. 1997) 18

United States v. Stitt,
441 F.3d 297 (4th Cir. 2006) 16

Wainwright v. Lockhart,
80 F.3d 1226 (8th Cir. 1996) 22

Walker v. Engle,
703 F.2d 959 (6th Cir. 1983) 20

INTRODUCTION

John Gillard was convicted and sentenced to death for the 1985 aggravated murders of Leroy Ensign and Denise Maxwell. Gillard now petitions the Court for a writ of certiorari to review the Sixth Circuit's habeas corpus decision.

This is not a proper case to address Gillard's argument that the *Cuyler v. Sullivan*, 446 U.S. 335 (1980), presumption of prejudice and the *Holloway v. Arkansas*, 435 U.S. 475 (1978), automatic reversal rules should apply to cases of "successive representation." In *Sullivan*, the Court established that a defendant is entitled to a presumption of prejudice where an "actual conflict of interest adversely affected his lawyer's performance." 466 U.S. at 350. As demonstrated in this opposition, the Ohio Supreme Court and Sixth Circuit correctly held that Mr. Martinez was not laboring under an actual conflict of interest because 1) he was no longer representing John Gillard's brother, William Gillard; 2) he himself informed the court that there was no conflict of interest; and 3) the interests of his clients did not diverge because John and William had a common defense that neither was involved in the murders and each provided alibi defenses for the other.

Contrary to Gillard's assertion that the lower court's refusal to recognize cumulative error as a claim in federal habeas corpus conflicts with decisions of several circuits, the Sixth Circuit's holding does not conflict with this Court's precedents or decisions of other circuits. It is true that the Court has held that courts should consider the possible effect of any alleged error or errors on the outcome of the proceeding, in the context of the proceedings as a whole. *See United States v. Hastings*, 461 U.S. 499, 509 (1983); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Darden v. Wainwright*, 477 U.S. 1768, 183 n. 15 (1986). However, the Court has never held that a habeas corpus

petitioner, through the kind of "catch-all" ground asserted by Gillard, can "cumulate" all of his claims to establish a plenary violation of his constitutional rights. Likewise, none of the circuit court cases cited by Gillard provide habeas corpus relief under Gillard's "catch-all" ground.

For the reasons explained below, the Warden opposes Gillard's petition.

STATEMENT OF FACTS

A. John Gillard shot Leroy Ensign, Ronald Postlethwaite and Denise Maxwell after a New Year's Eve party in the early morning hours of January 1, 1985 and then fled the state.

On December 31, 1984, Ronald Postlethwaite, his fiancée, Denise Maxwell, and several others attended a New Year's Eve party at the home of Timothy Hendricks. William Gillard attended the party for a short time, but got into a fist fight with Leroy Ensign and was asked to leave the party.

In the early morning hours of January 1, 1985, Postlethwaite was awakened by a gunshot outside. He looked out the window and saw William Gillard fire a second shot into the air. He went back to sleep but a short time later was awakened by the back door slamming open, heavy footsteps "like horses trampling" and then a shot being fired. Tr. Transcript, Vol. I, pg. 18. He was then grabbed by the hair, his head was pulled back and he was shot in the temple and thrown to the floor. Next, he witnessed his assailant, John Gillard, shoot and kill Denise Maxwell, and flee the house. The other people in the house called 911 and the police and rescue personnel were dispatched to the house. Denise Maxwell and Leroy Ensign were pronounced dead. Postlethwaite survived his injuries after emergency surgery.

Postlethwaite knew John Gillard and his brother, William Gillard. He identified John Gillard as the gunman, and subsequently testified against him at his capital murder trial.

John Gillard showed up at a friend's house in Wellsburg, West Virginia three days after the murder. Gillard was introduced to Ronald Webb and his wife as "Butch Johnson." Gillard had shaved his beard and had Mrs. Webb cut his hair. Webb mentioned to Gillard that he had "read in the paper where his brother was in jail for shooting some people in Canton." Gillard replied: "I pulled the trigger, my brother is taking the fall." Tr. Transcript, Vol. IV-A(2), pgs. 339-40.

Webb reported Gillard's whereabouts to the Brooke County, West Virginia sheriff's office. When arrested, Gillard identified himself to the arresting officers as "Butch Johnson."

B. John Gillard and William Gillard are arrested and John Gillard is bound over to the grand jury.

John Gillard and his brother, William Gillard, were arrested for the aggravated murders and a preliminary hearing was held. Louis Martinez represented John and William Gillard at the preliminary hearing on January 11, 1985. At the conclusion of the preliminary hearing, the trial court bound John Gillard over to the Stark County Grand Jury and dismissed the charges against William Gillard. The State continued to investigate William Gillard to determine what, if any, his level of participation was in the murder of Ensign and Maxwell and the attempted murder of Postlethwaite.

C. William Gillard testified as an alibi witness at John Gillard's trial.

John Gillard presented an alibi defense at his trial. When defense counsel announced at trial that William Gillard would be testifying, the State informed the court that Mr. Martinez had represented William Gillard up to this point and that "there could be a conflict at this point." Tr. Transcript, Vol. XXII, pg. 253. The State was concerned that after testifying on direct examination, William would invoke his Fifth Amendment rights effectively thwarting the State's right to cross-examine him. In response to the concerns raised by the State at trial, Mr. Martinez told the trial court, "I do not feel that there is a question of a conflict." Tr. Transcript, Vol. XXII, pg. 254. In an abundance of caution, the court appointed independent counsel to represent William Gillard, and took a break in the proceedings to allow William to talk with his new attorney.

William Gillard appeared as an alibi witness for John Gillard. William testified that he went to a party at Emmet Reardon's house on December 31, 1985; that his brother, John, attended the same party with Jerri Oney; and that after they left the party he did not see John again until the preliminary hearing on January 11, 1985. John Gillard later testified on his own behalf, as did two other witnesses who all corroborated William's testimony.

At the conclusion of his six-week jury trial, John Gillard was convicted and sentenced to death.

D. Evidentiary hearing on alleged conflict of interest.

While on direct review, the Ohio Supreme Court remanded the matter to the trial court for a hearing on the issue of an alleged conflict of interest posed by Mr. Martinez's representation of both John and William Gillard.

Mr. Martinez was unable to testify at the remand hearing because he suffered a stroke and was unable to communicate. Mr. Martinez's co-counsel, Craig Chessler, did testify. When asked if he was aware that Mr. Martinez was also representing William Gillard at the time of John Gillard's trial, Mr. Chessler stated:

> I was not aware of any formal representation or the absence of it. I don't know that there was an agreement reached with Louie and Bill as to representation. If there was or there wasn't, I'm not aware of that.

Remand Transcript, pg. 11. When asked if he had any knowledge of Mr. Martinez appearing with William Gillard in a formal proceeding or any police interrogation during the course of his representation of John Gillard, he replied:

> I can only speak for the time that I was involved in the case from February[1] to the conclusion of the trial in the mitigation phase, and I don't recall that taking place.

Remand Transcript, pg. 14. He further testified that he did not recall learning about a possible conflict with William's interest until it was raised by the State during trial.

Mr. Don Wuertz, a retired police lieutenant that did consulting work for Mr. Martinez, testified that he felt that there was a potential conflict. The stated basis for this belief was because the State had dropped the charges against

---

[1] The preliminary hearing occurred on January 11, 1985. Mr. Chessler testified that he began representing John Gillard as Mr. Martinez's co-counsel in late January or early February 1985. John Gillard's trial began on May 6, 1985.

William Gillard and then charged John Gillard with the murder. Mr. Wuertz also testified that he did not know the law on conflict of interests, he had discussed the possibility of a conflict with Mr. Martinez, and Mr. Martinez had assured him that a conflict of interest did not exist.

Petitioner's expert witness, Professor Charles Kirkwood testified that the viable defense Mr. Martinez should, but could not, have presented was an alibi *and* an alternate suspect defense. Under this theory, instead of solely arguing an alibi defense, Mr. Martinez should have also argued that William Gillard committed the murders. Professor Kirkwood testified that in his opinion, the circumstantial evidence pointing to William's involvement made the alternate suspect defense plausible. He admitted on cross-examination, however, that Mr. Martinez presented "a viable, good defense on behalf of John Gillard at that time at that trial" and that he had no information with respect to what defense John Gillard wanted pursued on his behalf. Remand Transcript, pg. 52. He further admitted upon questioning by the court that when he spoke in terms of a best defense being an alibi and a potential other suspect or substitute defendant he was speaking in the "abstract." Remand Transcript, pg. 59. Professor Kirkwood also testified that in each particular case it is the duty of trial counsel to evaluate the scale of any potential defense and go with what they believe is best under the particular circumstances.

Absent at the remand hearing was testimony from William and John Gillard. William Gillard did not testify regarding the extent and duration of time he was represented by Mr. Martinez. John Gillard did not testify regarding the discussions he had with Mr. Martinez regarding Mr. Martinez's alleged continued representation of his brother and the ramifications of any such continued representation. John Gillard also never testified that he would have approved

of his attorney presenting a defense that involved arguing that his brother, William, was the murderer.

Also absent from the remand hearing was the admittance of any paperwork documenting that Mr. Martinez was representing William Gillard at the time of John Gillard's trial. While paperwork was presented documenting William Gillard's subsequent plea agreement, where he pled guilty to aggravated burglary and agreed to testify against his brother in future proceedings, Mr. Martinez did not represent William Gillard in those proceedings.

E. The state court's treatment of Gillard's conflict of interest claim.

After an evidentiary hearing on the issue, the trial court issued an opinion holding that there was no conflict of interest and that Mr. Martinez's representation did not constitute ineffective assistance of counsel. Apx. at 193a. In so holding, the trial court stated:

> It was a common defense that neither brother was involved in the murders. The choice of defense tactics employed by Mr. Martinez certainly does not constitute an actual conflict of interest. There is no testimony or evidence that any dual representation at any point in time adversely affected the performance of Mr. Martinez as John Gillard's trial counsel.

Apx. at 192a.

The Ohio Supreme Court reviewed the trial court's decision, applied this Court's holding in *Sullivan* and found that Mr. Martinez did not labor under a conflict of interest. Apx. at 153a-161a. Specifically, the court found:

> .... We cannot say either that the alternative defense was viable or that Martinez' failure to argue, on behalf of appellant, that William was the "real killer" was due to Martinez' obligations to William. Although William may have been a plausible suspect, he was not an alternative suspect. Evidence of William's involvement was not inconsistent with appellant's guilt, i.e. none of the evidence implicating William either negated appellant's involvement or strengthened his alibi.
>
> If Martinez emphasized William's involvement in the murders, he would have conceded that the state's theory was in part correct...By attacking the state's evidence implicating William, Martinez undermined the state's case against appellant.

Apx. at 159a-160a.

F. The federal courts' treatment of the alleged conflict of interest claim.

Gillard next raised this claim on habeas appeal as his first ground for relief before the district court. The district court granted Gillard relief, finding Mr. Martinez operated under a conflict of interest and this conflict alone and in "accumulation" with evidence not disclosed to the defense before trial violated Gillard's constitutional rights. Apx. at 57a. The Warden appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit held that Gillard failed to demonstrate that Mr. Martinez labored under any conflict of interest and reversed the district court. The court found that "[b]ecause the Supreme Court has not held that successive representation gives rise to a presumption of prejudice, the *Sullivan* presumption does not control this habeas case." The

Sixth Circuit further concluded that trial counsel's "successive representation" did not adversely affect counsel's performance. Apx. at 12a-13a.

REASONS FOR DENYING THE WRIT

A. Gillard's case does not present the appropriate circumstances to address the scope of the conflict of interest rule announced in *Cuyler v. Sullivan* or the automatic reversal rule announced in *Holloway v. Arkansas.*

In *Sullivan*, the Court addressed two questions expressly reserved in *Holloway*: First, whether a state trial judge must inquire into the propriety of multiple representation even though no party lodges an objection; and, second, whether the mere possibility of a conflict of interest warrants the conclusion that the defendant was deprived of his right to counsel. 446 U.S. at 345. The Court concluded that a trial court is not required to inquire into conflicts of interest "[u]nless the court knows or reasonably should know that a particular conflict exists," and that, to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 347, 348.

Most recently, in *Mickens v. Taylor*, 535 U.S. 162 (2002), the Court took up the question as to what a defendant must show to demonstrate a violation of the Sixth Amendment, where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known. *Id.* at 164. Surveying its prior cases, the Court distilled the question to an inquiry as to whether, "under the circumstances of the present case," the Court should require the defendant to show prejudice as

required by *Strickland v. Washington*, 466 U.S. 668 (1984), or whether the circumstances were such that the likelihood of an unreliable verdict is so high that the defendant need not show a probable effect on the outcome. 535 U.S. at 166-167. The Court ultimately concluded that the trial court's failure to inquire did not require reversal of the verdict. In so concluding, the Court noted that *Sullivan* and *Holloway* "stressed the high probability of prejudice arising from multiple concurrent representation," and that "[w]hether *Sullivan* should be extended to [cases of successive representation] remains, as far as the jurisprudence of this Court is concerned, an open question." *Id.* at 175-176.

Gillard also asserts that the circuits are in conflict on *Sullivan's* application to cases of "successive representations," and, therefore, the Court should take up the question in his case. Pet. at 11. But the circuit courts are not in conflict. And even if it were necessary for the Court to address the question, Gillard's case is a poor vehicle for doing so.

The Supreme Court of Ohio applied *Sullivan* in Gillard's case. Hence, there is no need for the Court to determine, in this case, under what circumstances beyond "multiple concurrent representation," if any, *Sullivan's* presumption of prejudice should be applied. And, assuming that "successive representation" could involve circumstances calling for a presumption of prejudice, the facts of Gillard's case clearly do not fit. The potential conflict involved counsel's representation of brothers with a powerful personal incentive to pursue a common defense — hardly a case where a potential conflict of interest could result in a high likelihood of an unreliable verdict. The circumstances here do not remotely resemble the facts in the supposedly conflicting cases cited by Gillard in his petition.

In sum, as more fully discussed below, the Court should decline to address the "conflict of interest" question presented by Gillard's petition.

1. Because the Supreme Court of Ohio applied *Sullivan* in this case and found no actual conflict, there is no need for the Court in this case to address the scope of *Sullivan's* application to situations of successive representation.

Gillard's first ground for habeas corpus relief asserted that he was deprived of his rights under the Sixth Amendment because lead counsel, Mr. Martinez, operated under a conflict of interest. The district court granted relief, finding that counsel labored under an actual conflict of interest by virtue of his representation of both John Gillard and his brother, William. The district court essentially agreed with Gillard's contention that counsel's representation was adversely affected because if trial counsel had not represented Gillard at the brothers' joint arraignment, counsel would have argued at John Gillard's trial that William Gillard was the killer. Apx. at 56a-57a.

Gillard raised this claim as his first proposition of law on his second direct appeal to the Supreme Court of Ohio after the Fifth District Court of Appeals upheld Gillard's death sentence. The Supreme Court of Ohio remanded the case for an evidentiary hearing to determine whether Gillard's counsel labored under an actual conflict of interest that adversely affected counsel's performance. *See State v. Gillard*, 64 Ohio St. 3d 304 (1992). After conducting an evidentiary hearing on the issue, the trial court issued an opinion holding that there was no conflict of interest and that Mr. Martinez's representation did not constitute ineffective assistance of counsel. Apx. at 191a-193a. In so holding, the trial court found that Gillard presented the "common

defense" that neither brother was involved in the murders, and that this tactical choice did not evidence an actual conflict of interest that adversely affected counsel's representation. Apx. at 186a-188a, 192a.

The Supreme Court of Ohio reviewed the trial court's decision and agreed that Mr. Martinez did not labor under a conflict of interest. Apx. at 160a. The Supreme Court of Ohio, applying *Sullivan*, held that there was no actual conflict of interest that adversely affected counsel's representation. Apx. at 160a. The court reasoned that contrary to Gillard's assertions, the evidence did not warrant a finding that pinning the murder on William was a viable alternate defense. Had the facts been otherwise, William may have been a plausible suspect. In this case, however, evidence of William's involvement would not have been inconsistent with Gillard's guilt, as none of the evidence implicating William either negated Gillard's involvement or strengthened his alibi. To the contrary, the state claimed that both Gillard and William were involved in the murders. Apx. at 159a-160a.

The Supreme Court of Ohio reasoned that a defense on the basis that William and not John Gillard killed the victims was not plausible in light of the prosecution's evidence. Apx. 159a-160a. The state called Ronald Webb, who testified that Gillard confessed to him that "I pulled the trigger, and my brother's taking the fall." By blaming William for the murder, counsel risked substantiating Webb's testimony. More importantly, as found by the Supreme Court of Ohio, the principle evidence against John Gillard consisted of the testimony of a surviving eyewitness who knew both John and William Gillard and who testified that John shot him. Shifting the blame to William in effect would have confirmed the remaining evidence that placed William and John Gillard at the scene and would have powerfully

corroborated the surviving witness's testimony. Apx. at. 159a-160a.

Like the lower court in *Mickens*, the Supreme Court of Ohio reasonably assumed that *Sullivan* applied. Thus, this case is not an appropriate vehicle for this Court to determine under what circumstances, if any, *Sullivan* should be extended. In his petition, Gillard argues that the Sixth Circuit "categorically" ruled that *Sullivan* did not apply and therefore that the district court erred in granting habeas corpus relief. Pet. at 9. The Sixth Circuit indeed held, consistent with *Mickens*, that counsel's representation was "successive" and therefore no conflict of interest existed for the purpose of applying *Sullivan's* presumption of prejudice. *Gillard v. Mitchell*, 445 F.3d 883 (6th Cir. 2006), slip op. at Apx. at 12a.

The Sixth Circuit also held that Gillard had failed to show that counsel's "successive representation" of William Gillard adversely affected counsel's representation of John Gillard. Apx. at 13a. Thus, the Sixth Circuit found that there was no actual conflict — as a matter of fact. The Sixth Circuit relied on the Supreme Court of Ohio's factual findings that pointing the finger at William was not a plausible strategy and that accordingly there was no actual conflict of interest. On this basis, the Sixth Circuit found that the Supreme Court of Ohio's decision was not "contrary to, or an unreasonable application of, clearly established federal law." *Id.* at Apx. at 12a -13a. In other words, even if the Sixth Circuit *had* concluded that prejudice could be presumed under *Sullivan*, if an "actual conflict" had been proven, it nevertheless would not have granted Gillard habeas corpus relief, because he failed to make the requisite showing of an actual conflict.

In sum, there is no good reason to determine the scope of *Sullivan's* application with this case.

2. Under the facts and circumstances of this case, there is no likelihood that counsel's "successive representation" evidences circumstances that would require application of *Sullivan's* presumption of prejudice and *Holloway's* automatic reversal rule.

Assuming that an "actual conflict" could arise in a situation involving an attorney's successive representation of co-defendants—thereby requiring a presumption of prejudice—these circumstances do not exist in Gillard's case. The presentation of a "united front" strategy was entirely natural and voluntary. Unlike other co-defendants, John Gillard had a very strong motivation not to "point the finger" at his own brother. Rather, William testified as a witness for the defense in support of John Gillard's alibi defense. It is an unusual circumstance where a defendant claims that counsel's performance was adversely affected by representing a witness who testified in favor of the defendant. Finally, as found by the Supreme Court of Ohio, under the circumstances, evidence pointing to William would have bolstered the State's case against John Gillard. Thus, the particular facts and circumstances of Gillard's case do not establish a potential conflict of interest that could result in such a high likelihood of an unreliable verdict that a presumption of prejudice is required.

Moreover, any potential conflict of interest raised by counsel's representation of Gillard's brother does not remotely approach the potential or actual conflicts in the cases cited by Gillard in his petition. Gillard primarily relies on the Fifth Circuit's decision in *Perillo v. Johnson*, 205 F.3d 775 (5th Cir. 2000). Gillard claims that in *Perillo*, the court "rejected the argument that a habeas conflict claim arising from a successive representation 'is either not governed by

Cuyler (*v. Sullivan*) or is *Teague* barred because her claim is not clearly governed by *Cuyler*.'" Pet.. at 15. *Perillo* was issued some two years prior to this Court's decision in *Mickens*. In any event, the Fifth Circuit described counsel's representation of the two clients as successive *and* concurrent, finding it was "painfully obvious" that the two clients had very divergent interests. 205 F.3d at 802, 804.

In *Perillo*, the defense attorney, Skelton, represented Perillo on aggravated murder charges. He had previously represented her co-defendant, Fletcher, on aggravated murder charges where he successfully negotiated with the prosecutor and got the murder charges dropped. Skelton also represented Fletcher and effectively negotiated immunity for her testimony against a third co-defendant, Briddle. Skelton subsequently represented Perillo in her capital trial for the aggravated murders. Fletcher became the State's star witness at Perillo's capital murder trial. Skeleton continued to represent Fletcher at that time. When she came to Texas to testify he had her stay at his house, where he spent the evening before her testimony going over in detail her testimony and the cross-examination questions he would ask. He knew it was important that her testimony at Perillo's trial mirror the testimony she provided in Briddle's case or she would risk at the very least charges being brought against her for perjury and may possibly risk losing the immunity that he had negotiated. Fletcher's testimony was detrimental to Perillo. At the very inception, Skelton's strategy at Fletcher's criminal trial was to develop "the most egregious and inculpatory evidence of Perillo's own guilt, and by comparison, Fletcher's innocence." *Id.* at 802. Skelton continued this theme throughout Briddle's and Perillo's trials as well. In fact, rather than effectively cross-examine Fletcher on this testimony at Perillo's trial, he brought out even more inculpatory evidence against Perillo. *Id.* at 803.

Simply stated, the *Perillo* case involved defense counsel's active representation of one client's interests while that client was on the stand testifying against a second client. By comparison, this case at worst involved a defense counsel who previously represented another suspect in the crime and who later presented that suspect as a witness for the defense—a witness who happened to be the brother of his current client and had a strong interest in assuring that the current client and brother was not convicted and sentenced to death. *Compare United States v. Infante*, 404 F.3d 376 (5th Cir. 2005) (finding that the trial attorney labored under a conflict of interest when he represented the defendant and two witnesses that testified against him, causing the attorney to choose between vigorously cross-examining the witnesses to their detriment, or not vigorously cross-examining them to the defendant's detriment); and *Enoch v. Gramley*, 70 F.3d 1490 (7th Cir. 1995) (a pre-*Mickens* case involving a lawyer who was forced to cross-examine a witness who he had represented four years ago thus forcing him to run the risk of failing to cross-examine the former client rigorously for fear of revealing or misusing privileged information).

Gillard's alleged conflicts of interest are easily distinguishable on their facts. For example, in *United States v. Stitt*, 441 F.3d 297 (4th Cir. 2006), the conflict of interest did not arise from representing multiple clients (concurrently or successively). Rather, the conflict arose between the attorney's private interests and those of his client. Stitt hired Malinski to represent him on three counts of murder and numerous federal drug and firearms offenses. During Stitt's murder trial, the prosecutor alleged that Malinski had received $500,000 in drug money to represent Stitt. *Id.* at 300. During federal habeas corpus proceedings, Stitt claimed that Malinski labored under a conflict of interest and that his personal interests prevented him from asking the district court to appoint a qualified mitigation expert. *Id.* at 301. Malinski located and sought to hire a well-known expert in

the field of future dangerousness in prison. However, when Malinski learned that Stitt's family could not afford to hire the expert, Malinski opted to hire a concededly less expensive and less qualified doctor, rather than ask the trial court to appoint the more experienced doctor. At an evidentiary hearing held in federal district court, Malinski testified that he did not seek a court-appointed expert to avoid "the Government's inquiry into the source of payments made to him." *Id.* at 301. The Fourth Circuit found that Malinski chose to hire the less qualified doctor solely because he wanted to protect his financial arrangements from the court's scrutiny. The Court concluded that this was not a reasonable basis for the decision, because the circumstances suggest that Malinski could have obtained a court-appointed expert. *Id.* at 301. The Court then found that Malinski labored under an actual conflict of interest that adversely affected Stitt's defense and presumed prejudice under the *Sullivan* standard.

Contrary to Gillard's argument the Sixth Circuit's finding that the trial court "did all that was required of it" is not in conflict with other circuit courts. Pet. for Writ of Cert. at 21. Gillard asserts that the Court's precedent mandates that a court aware of a potential conflict of interest, "1) obviate the risk by substituting conflict-free counsel or allowing the defendant to waive the conflict; or 2) affirmatively establish that there is no conflict." *Id.* at 22. Gillard's trial court did both.

First, the court inquired of Mr. Martinez regarding whether or not a conflict existed. Mr. Martinez told the court, "I do not feel that there is a question of a conflict." Tr. Transcript, Vol. XII, pg. 254. Mr. Martinez—as counsel familiar with the case and an officer of the court—was in the best position to determine whether a conflict of interest existed and he clearly believed there was no conflict of interest. Second, in an abundance of caution he appointed

William Gillard a lawyer so Mr. Martinez would not be representing him at the time William testified on behalf of his brother, John.

Other cases Gillard cites involve issues of competing interests that are easily distinguishable from this case. For example, in *United States v. Sonia Gallegos*, 108 F.3d 1272 (10th Cir. 1997), Mr. Blackburn represented Gallegos against a numerous count indictment charging drug and money laundering violations. Gallegos was indicted along with nine co-defendants. Prior to the start of trial, Mr. Blackburn learned that Frank Gutierrez, a former client, was listed as a potential witness for Gallegos's co-defendant, Aguirre. Immediately upon learning this information, Mr. Blackburn alerted the court that he was concerned about the attorney-client privilege and his ability to question Mr. Gutierrez and was afraid that he had a conflict of interest. The court stated that it would take up the matter if, and when, Aguirre called Gutierrez as a witness. At trial, when Mr. Gutierrez was called to testify, Mr. Blackburn notified the court that he was being placed in the position of representing competing interests. He informed the court that Mr. Gutierrez had information that was exculpatory to Gallegos. He further instructed the court that "my loyalties to [Mr. Gutierrez] has to be to say you need to take the Fifth Amendment. My loyalties to my client, Sonia Gallegos, is that he should testify. I see no way to rectify that decision." *Id.* at 1282. The court refused to sever Gallegos trial from that of her co-defendants and refused to provide Gutierrez with another lawyer as the prosecution requested. *Id.* at 1277.

Here, Gillard's attorney, Mr. Martinez, had no such competing interests. Mr. Martinez's former client was William Gillard, the brother of his current client, John Gillard. The State's theory of the crime was that both brothers were involved. The brothers had a common defense that they were not there and a common interest in making

sure that neither brother was convicted. More specifically, if John Gillard could effectively convince the jury (through the use of William Gillard's alibi testimony) that both he and William Gillard were not involved in the murders, John Gillard could not only save himself from the aggravated murder charges but could ensure that William was not subsequently indicted on related charges stemming from the same incident.

None of the cases cited by Gillard involve a conflict occurring between a client and a former client who is the brother of the current client and is testifying on the current client's behalf as an alibi witness. The cases Gillard cites in support of his position are not analogous to his situation. They do not support granting Gillard's petition, and, in fact, show that Gillard's case is a poor vehicle to build upon this Court's holding in *Sullivan* or to extend *Sullivan's* presumption of prejudice and *Holloway's* automatic reversal rules to cases involving "successive representation."

In a nutshell, there is no reason for the Court to take up the "conflict of interest" questions asserted by Gillard.

B. This Court should not take this case to establish a "catch all" cumulative error claim for habeas corpus petitioners such as Gillard.

There is no established "catch all" cumulative error rule in habeas corpus, and the Court should not take this case to establish one. Gillard argues that the Sixth Circuit's "refusal to recognize cumulative error as a claim in federal habeas directly conflicts with decisions of the Fifth, Seventh, Ninth and Tenth Circuits." Pet. at 24. Gillard raised seventeen grounds in which he alleged that his convictions and sentences are constitutionally erroneous. Gillard claimed, in his first ground for relief that his lead trial counsel labored under a conflict of interest; and in his fifth ground, that the

prosecution "suppressed material, exculpatory and impeachment evidence." In his seventeenth and final ground, Gillard claimed that his "convictions and death sentences are invalid under the Federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, a fair tribunal, an impartial jury, and a reliable sentence due to the cumulative errors in the misconduct by the state officials and witnesses, and the systematic deprivation of his right to the effective assistance of counsel." The district court held the seventeenth ground to be "well-taken," reasoning that "although this Court did not grant relief for Petitioner's assertions in Ground 5, the Court noted that the alleged errors in that claim, while insufficient to rise to the level of a constitutional violation on its own, underscored the unfairness of Petitioner's trial in light of the conflict of interest." Apx. at 35a, 36a, 108a.

The Sixth Circuit reversed. As noted previously, the Sixth Circuit determined that Gillard's trial counsel did not labor under an actual conflict of interest, and that the allegedly suppressed evidence was not material to Gillard's guilt or punishment. In reversing the district court's grant of relief on Gillard's seventeenth ground, the Sixth Circuit held:

> While we have recognized that "[e]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair," *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983), the "Supreme Court has not held that distinct constitutional *claims* can be cumulated to grant habeas relief," *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002) (italics added). Thus, the Ohio courts' determination is not contrary to, or an unreasonable application of, clearly established federal law as determined

> by the United States Supreme Court because Gillard's individual assignments of error would not support habeas relief, and the cumulative effect thereof is likewise insufficient. *See Scott v. Elo*, 302 F.3d 598, 607 (6th Cir. 2002) (identical to the case at bar).

Gillard v. Mitchell, slip op. at Apx. 27a.

Contrary to Gillard's assertions, the Sixth Circuit's holding does not conflict with Court precedent or the other circuits. While this Court often has held that courts should consider the possible effect of any alleged error or errors on the outcome of the proceeding, in the context of the proceeding as a whole, this proposition applies with respect to an error that itself is of constitutional dimension, or an error that does not rise to the level of a constitutional violation unless a prejudicial effect on the outcome is shown. *See Darden v. Wainwright*, 477 U.S. 168, 183 at n.15 (1986) (distinguishing between error that is of constitutional dimension but harmless and error that is not a violation of the constitution because it did not deprive the defendant of fundamental fairness "in the context of the facts and circumstances of the case."); *compare United States v. Hastings*, 461 U.S. 499, 509 (1983); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (examination "of the entire proceedings" demonstrated that prosecutor's allegedly improper remark resulted in a violation of due process). As correctly pointed out by the Sixth Circuit, this Court has never suggested, much less held, that a habeas corpus petitioner, through the kind of "catch-all" ground alleged by Gillard, can "cumulate" all of his claims to establish a plenary violation of his constitutional rights. Apx. at 27a.

As Gillard acknowledges, *see* Pet. at 24-25, the cases he cites are completely consistent with the well-established principle stated above. *Hamilton v. Mullin*, 436 F.3d 1181, 1196-1197 (10th Cir. 2006) ("Our cases explain that cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.") (internal quotation marks and citation omitted); *Darks v. Mullin*, 327 F.3d 1001, 1017 (10th Cir. 2003) (finding that cumulative effect of errors did not amount to a violation of due process and therefore determining that "we need not reach the State's argument that no Supreme Court authority recognizes cumulative error as a separate constitutional ground for granting habeas relief"); *Thomas v. Hubbard*, 273 F.3d 1164, 1179 (9th Cir. 2001) (holding that "cumulative" effective of error resulted in a violation of due process under the "well-established" principles of *Donnelly v. DeChristoforo*); *Alvarez v. Boyd*, 225 F.3d 820, 824-825 and n. 1 (7th Cir. 2000) (noting *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) (finding that "cumulative" effect of alleged error did not deprive defendant of a fair trial, and noting that it need not consider whether "errors that are not unconstitutional individually cannot be added together to create a constitutional violation")); *Jackson v. Johnson*, 194 F.3d 641, 655 at n. 59 (applying due process test in holding that "the individual errors did not merit relief, nor can we conclude that the cumulative effect of the alleged errors fatally effected the fundamental fairness of the trial.").

And, contrary to Gillard's argument, the Sixth Circuit considered the "cumulative" effect of the alleged errors upon which the district court granted relief, and found that the "cumulative effect" did not deprive Gillard of a fair trial. The Sixth Circuit explicitly held that "Gillard's individual assignments of error would not support habeas relief, and the

cumulative effect thereof is likewise insufficient." *Gillard v. Mitchell*, slip opinion at Apx. 27a. (citing *Scott v. Elo*, 302 F.3d 598, 607 (6th Cir. 2002) (holding that although this Court has not held that constitutional errors can be cumulated, "In any event, we do not find that any errors, even when cumulated, denied Scott a fair trial.")).

In short, the Sixth Circuit's decision is neither contrary to the standards set forth by this Court or in conflict with the decisions of other circuits.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

MARC DANN
Attorney General of Ohio

ELISE PORTER*
Acting Solicitor General
**Counsel of Record*
HEATHER L. GOSSELIN
CHARLES L. WILLE
Assistant Attorneys General
30 East Broad Street,17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Respondent
Betty Mitchell

January 29, 2007